

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ERIN M. MERTENS)	
Claimant)	
)	
VS.)	
)	
APAC)	
Respondent)	Docket No. 1,025,801
)	
AND)	
)	
INDEMNITY INS. CO OF NO. AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the April 5, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

The ALJ granted claimant's request for medical treatment for her low back and right knee complaints, which he concluded arose out of and in the course of her employment with the respondent on September 15, 2005.

The respondent requests review of this Order alleging the claimant failed to meet her burden of establishing that she suffered an injury arising out of and in the course of her employment. Respondent bases its argument on a plethora of evidence, all of which it suggests refutes claimant's version of the events and her alleged accident. Thus, the ALJ's preliminary hearing Order should be reversed.

Claimant contends the ALJ's preliminary hearing Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds the preliminary hearing Order should be affirmed.

Following a lengthy preliminary hearing and the receipt of several depositions, the ALJ granted claimant's request for medical treatment. In doing so, he capsulized his reasoning as follows:

The evidence before the Court is voluminous, somewhat vague and somewhat contradictory. Claimant is unable to testify coherently about the events on her alleged date of accident, but she does describe an accident that is plausible as a mechanism of injury for her current complaints. While her testimony is not corroborated by her co-workers, neither is the testimony of her supervisor, Don Zolmon, corroborated by those co-workers. In the final analysis, there is but one medical opinion before the Court and Dr. Brown finds objective evidence of injuries compatible with the accident [c]laimant describes. While it is a close call and is subject to review at Regular Hearing, the Court will find, for preliminary hearing purposes, that [c]laimant has sustained her burden of proof of personal injury by accident arising out of and in the course of her employment.¹

The ALJ's observations regarding the record are correct. The preliminary hearing itself comprises 126 pages of testimony. In addition to that evidence, and the attached exhibits, is the deposition testimony of Don Zolmon, claimant's direct supervisor (72 pages); Jeff Shaw (25 pages); Bruce Hill (86 pages); Sergio Reza (31 pages) and Roberto Quintana (41 pages). There is no need to reiterate each witnesses' testimony as the ALJ's overview, set forth above, adequately frames the parties' dispute. Put simply, claimant testified that she hurt her low back and right leg while moving a generator. Respondent denies this fact. The two main actors in these events, claimant and Don Zolmon, present factual scenarios that are inconsistent with one another and uncorroborated by other witnesses. Claimant did present medical evidence that while not yet subject to cross examination, establishes her present complaints are consistent with the sort of injury she alleges occurred on September 15, 2005.

After considering all this evidence, the ALJ concluded claimant had sustained her burden of proof and awarded medical treatment. Although respondent contends the ALJ erred, the Board is not persuaded. The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and based upon his written rationale, obviously weighed that against the deposition testimony of respondent's witnesses. The Board concludes that some deference may be given to the ALJ's findings under these facts and circumstances. Accordingly, the ALJ's preliminary hearing Order is affirmed.

¹ ALJ Order (Apr. 5, 2006) at 1.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.²

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated April 5, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

BOARD MEMBER

c: Andrew Oswald, Attorney for Claimant
Vincent Burnett, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a(a)(2).